UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OXFORD ELECTRONICS, INC. D/B/A OXFORD AIRPORT TECHNICAL SERVICES AND WORLDWIDE FLIGHT SERVICES, INC., JOINT EMPLOYERS;

OXFORD ELECTRONICS, INC. D/B/A OXFORD AIRPORT TECHNICAL SERVICES AND TOTAL FACILITY MAINTENANCE INC., JOINT EMPLOYERS; AND

OXFORD ELECTRONICS, INC. D/B/A OXFORD AIRPORT TECHNICAL SERVICES AND TWIN STAFFING, INC., JOINT EMPLOYERS

and Case No. 13-CA-115933

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 399, AFL-CIO

TRANSPORTATION WORKERS UNION OF AMERICA-LOCAL 504, AFL-CIO (OXFORD ELECTRONICS, INC. D/B/A OXFORD AIRPORT TECHNICAL SERVICES, WORLDWIDE FLIGHT SERVICES, INC., TOTAL FACILITY MAINTENANCE, INC., AND TWIN STAFFING, INC.)

and

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 399, AFL-CIO Case No. 13-CB-115935

REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE ON BEHALF OF RESPONDENTS OXFORD ELECTRONICS, INC. d/b/a OXFORD AIRPOT TECHNICAL SERVICES AND WORLDWIDE FLIGHT SERVICES, INC.

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PRELIMINARY STATEMENT

Respondents Oxford Electronics, Inc., d/b/a Oxford Airport Technical Services ("Oxford") and Worldwide Flight Services, Inc. ("WFS" or "Worldwide") (collectively, "Oxford/WFS" or "Oxford/Worldwide") submit this reply brief in response to the Counsel for the General Counsel's ("GC") brief in Answer to Respondent's Exceptions ("GC Brief") and Charging Party's ("CP") brief in opposition to Respondent Employers' and Respondent Union's Exceptions to the ALJ's Decision and Recommended Order ("CP Brief"), both served July 26, 2017, and in further support of the Oxford/WFS exceptions to the May 31, 2017 decision of Administrative Law Judge Kimberly Sorg-Graves ("ALJ").

Remarkably, as did the ALJ, GC *totally ignores* (and CP virtually ignores) almost each and every fact and argument relied upon by Oxford/WFS to challenge NLRB jurisdiction, including the untenable policy implications of the ALJ's decision: i.e., that any ruling that Oxford/WFS violated the NLRA by complying in good faith with the RLA and abiding by the terms of an existing certification would force those employers traditionally covered by the RLA into a perilous choice of either honoring their NMB certifications and risking potential liability in the event the NLRB later chooses to assert jurisdiction; or, ignoring such certification and risking liability for violating the RLA's requirement that employers bargain with the "representative so certified." Focusing almost entirely, and we submit incorrectly, on an inapposite analysis of the extent of CICA-TEC control over Oxford/WFS at T5, they simply disregard – without explanation – the Transportation Workers Union of America-Local 504's ("TWU") 30 year *nationwide* bargaining history with WFS and its predecessors under the RLA, TWU's *nationwide* NMB certification as the sole and exclusive collective bargaining representative of WFS employees under the RLA, and the undisputed extension of the TWU CBA to new

locations throughout this history. Given their utter disregard of the threshold jurisdictional issue, it is unsurprising that GC and CP similarly ignore (or virtually ignore) those facts and arguments challenging the status of Oxford/WFS as a successor if subject to the NLRA; and, if subject to the NLRA and a successor, challenging Oxford/WFS' right to set initial terms and conditions by applying the terms of WFS' collective bargaining agreement with TWU ("TWU CBA"). The cursory manner in which first the ALJ, and now the GC and CP Briefs, dispose of these issues demonstrates, we submit, the fundamental errors underlying the decision of the ALJ below.

ARGUMENT

POINT I

FACTS AND ARGUMENTS IGNORED BY GC AND CP FURTHER SUPPORT THE ALJ'S ERROR IN REJECTING RLA JURISDICTION IN THIS CASE[1]

1. **Only the NMB, and certainly not the NLRB, has authority to apply, overrule or contradict the NMB certifications upon which WFS relied in applying its TWU CBA to this new location at T5. (Oxford/WFS Brief at 20-23).**

- Neither brief addresses these issues. (GC Brief, *passim*; CP Brief, *passim*).

2. **The decision to apply the WFS-TWU CBA was made while the CICA-TEC contract was being bid and was brought to the attention of the former ABM employees and Local 399 beginning in October 2012. At that time, Oxford/WFS could not possibly have known whether interactions with CIC TEC in the 3 ½ years after commencing operations would rise to the level of "control" under any of the shifting NMB standards. Yet, the ALJ decision on RLA jurisdiction rests entirely on events that occurred long after the decision (and the announcement of the decision), an outcome which raises serious due process concerns. (Oxford/WFS Brief at 10-12, 30-31).**

- GC Brief: GC does not address this very real and serious concern, other than to casually refer to the fact that Oxford/WFS was "mistaken" in their "belief that they were subject to the [RLA]". (GC Brief at 37). Also, in an apparent effort to suggest that Oxford/WFS was

[1] Rather than repeat facts and arguments previously detailed by Oxford/WFS in its Brief in Support of Exceptions ("Oxford/WFS Brief"), we will identify the facts/arguments previously presented (with citations to the Oxford/WFS Brief) and identify where, if at all, GC or CP respond. If further discussion is needed, it is included in "Reply Discussion".

dismissive of the situation facing CP, GC repeatedly refers to an alleged comment to Roger McGinty at Local 399 that it was "out of luck." (GC Brief at 6, 37).

- CP Brief: The CP brief does not address this issue in any manner. (CP Brief, *passim*).
- Reply Discussion: As the outcome of this case should ultimately demonstrate, Oxford/WFS was not "mistaken" in their belief that their obligations under the RLA certifications and RLA-based nationwide TWU CBA applied here. Moreover, no one has suggested how or why Oxford/WFS, at the time it applied its historical obligations at T5, should or could, have known what later facts might develop. Clearly, at the time it acted, the only action it could lawfully take in light of its history and the requirements of the RLA was to act as it did. And, despite the GC's effort to characterize the advice to Local 399 as a cavalier dismissal ("out of luck"), McGinty actually testified that he was told as follows: "He said that Oxford has a nationwide contract with TWU and they are under the Railway Labor Act . . . He said basically I'm out of luck, that they followed the Railway Labor Act." (Tr. 57).

3. The procedural history of this case, wherein the Board initially referred the question of RLA jurisdiction to the NMB, and then withdrew the referral without explanation. By so doing, it disregarded long-standing Board law and practice wherein it has allowed the NMB to rule and has declined to assert jurisdiction unless it was clear that the NMB would rule the RLA inapplicable. (Oxford/WFS Brief at 4-5; 25-27).

- GC Brief: GC utterly ignores this issue. (GC Brief, *passim*).
- CP Brief: CP ignores the procedural history and posits only that "the Board will not refer a case to the NMB that presents a jurisdictional claim in a factual situation similar to one in which the NMB has previously declined jurisdiction." (CP Brief at 4-5).
- Reply Discussion: Although Oxford/WFS presented extensive argument distinguishing the facts and background here from any other cases ever decided by the NMB (*see* Oxford/WFS Brief at 23-25), neither GC or CP addresses that authority nor identifies a single NMB

decision declining RLA jurisdiction in a situation where, as here, a derivative carrier with a long nationwide bargaining and certification history under the RLA was found not to be subject to the RLA at a new location. The reason should be obvious: there are none.

4. **The background of TWU's historic nationwide bargaining relationship under the RLA with the corporate predecessors to WFS, American Airlines and AMRS and their history of nationwide CBAs under the RLA. (Oxford/WFS Brief at 6-9, 14-20)**.

- GC and CP Briefs: Neither brief mentions this historic relationship. (GC Brief, *passim*; CP Brief, *passim*).

5. **The undisputed fact that, at all times since acquiring the company from AMRS, WFS has also had a nationwide bargaining relationship with TWU under the RLA, including, among other things: (1) 1999 NMB certifications of TWU as the exclusive nationwide representative of the employees of WFS; and, (2) consistent nationwide CBAs with TWU under the RLA. The existence of this historic nationwide bargaining relationship is required by the RLA and fully supports the absence of NLRA jurisdiction here. (Oxford/WFS Brief at 6-9, 14-23).**

- GC Brief: GC completely ignores this history. Indeed, search of the GC Brief for the word "certification" comes up empty. (GC Brief, *passim*).
- CP Brief: CP mentions the existence of the certifications (in a single paragraph), citing the ALJ's decision that these certifications are irrelevant absent a prior finding of RLA jurisdiction, and characterizing that decision, without explanation, as "spot on." (CP Brief at 2). CP further argues that *Aircraft Service Int., Inc.* 365 NLRB No. 94 (June 17, 2017) ("*ASIG*") supports that view.
- Reply Discussion: *ASIG* is inapposite. Unlike here, the NMB never certified a nationwide class or craft of ASIG employees for purposes of collective bargaining under the RLA, nor did ASIG have a history of nationwide bargaining under the RLA (let alone a decades-long bargaining history). Moreover, ASIG *admitted* that it had *no* evidence to satisfy *any* of the six factors of the traditional NMB test – a far cry from the case at hand. 365 NLRB at 94.

6. **The undisputed fact that whenever work of the type covered by the TWU certifications and the AMRS/WFS-TWU CBAs was acquired at new locations, such work automatically was included within the scope of the TWU certifications and CBAs, action both contemplated and required by the RLA, and required by the terms of the WFS-TWU CBA. (Oxford/WFS Brief at 14-15).**

- GC and CP Briefs: Again, this undisputed fact, and the legal implications of this fact under the RLA and the TWU CBA, are nowhere addressed. (GC Brief, *passim;* CP Brief, *passim*).

7. **Maintaining stable bargaining relationships is an important factor in evaluating RLA/NLRA jurisdictional issues, as recognized by the Board in *United Parcel Service, Inc.*, 318 NLRB 778 (1995). And, as noted by the D.C. Circuit in *Allied Aviation Serv. Co. v. NLRB*, 854 F.3d 55, 61 (D.C. Cir. 2017), given the critical importance of maintaining "smooth operation of the nation's rail and air carriers, the RLA places a higher priority than the NLRA on avoiding strikes and lockouts." Here, although the ALJ speculates that application of NLRA will not affect labor stability, the potential adverse impact is substantial. (Oxford/WFS Brief at 16-20).**

- GC Brief: The GC Brief utterly ignores these concerns, and does not discuss these cases or the potential consequences of nationwide representation by TWU and isolated representation of workers performing the same functions by Local 399 at T5 only. (GC Brief, *passim*).

- CP Brief: Other than repeating the imperfect analysis of the ALJ, which CP characterizes as "spot on", and, without explanation, blaming Oxford/WFS for causing instability, CP dismisses these issues as "nothing more than broad policy concerns". (CP Brief at 3-4).

- Reply Discussion: CP is absolutely correct; the issues here presented raise "broad policy concerns" which neither the ALJ, GC nor CP has made the slightest effort to address in any responsible manner.

8. **In ignoring all of the foregoing and simply relying on application of "control" tests developed and more recently altered (without explanation) by the NMB, the ALJ erroneously gave undue emphasis to "meaningful control over personnel decisions" reflecting "control greater than that found in a typical subcontractor relationship." (Oxford/WFS Brief at 28-29). The D.C. Circuit in *ABM Onsite Servs.-West, Inc. v. NLRB*, 849 F.3d 1137 (D.C. Cir. 2017) has called into question the authority of the NLRB to apply this criteria in the absence of explanation why settled authority was being disregarded. And, on remand, the NLRB is allowing the NMB, as it should have**

done here but aborted, to address these ever-shifting criteria. (Oxford/WFS Brief at 28-29).

- GC Brief: The GC Brief simply applies this test without addressing whether it is properly applicable. (GC Brief at 15-16).
- CP Brief: CP emphasizes application of the "NMB's traditional factors" to establish alleged lack of control, citing *Signature Flight Support*, 32 NMB 214 (2005) and *Bombardier Transit Systems Corporation*, 32 NMB 131 (2005) as supporting the view that the degree of control exercised by CICA-TEC did not support RLA jurisdiction. (CP Brief at 5-15). CP gives only passing attention to the recent NMB standards erroneously relied on by the ALJ and GC. (CP Brief at 13-14).
- Reply Discussion: The sheer volume of discussion of the facts regarding the issue of control, NMB authorities, and application of those facts to the NMB's shifting standards (which the NLRB is now asking the NMB to clarify in *ABM Onsite*) (*compare* Oxford/WFS Brief at 31-40 *with* GC Brief at 13-27; CP Brief at 5-15; *see also* Total/Twin Brief at 14-19), conclusively demonstrate that if the issue of control is, in any manner, here dispositive, that issue must be decided by the NMB, not the NLRB. Moreover, comparison of the facts and background here, and those in *Signature* and *Bombardier*, do not require rejection of RLA jurisdiction.[2]

In sum, both GC and CP – like the ALJ – *wholly* ignore the numerous factors warranting a finding of RLA jurisdiction, including WFS' long and consistent history of bargaining under

[2] By way of example, the NMB declined to assert jurisdiction in *Bombardier Transit Systems Corporation* largely because the Port Authority of New York and New Jersey, which managed the JFK AirTran, was not a carrier for purposes of the RLA and because the Port Authority denied having any involvement or control over hiring, disciplining, directing or managing Bombardier's work. 32 NMB at 147. Likewise, the carrier in *Signature Flight Support* did not provide office space or equipment; have any involvement over hiring; or, have any control over employee appearance standards – all factors over which CICA-TEC has exerted control. 32 NMB 214 at 226.

the RLA; WFS' existing NMB certifications applicable to the class of employees at issue here; and, WFS' decades-long bargaining relationship with TWU. Ignoring these factors, however, does not make them disappear – these factors exist and, we submit, are dispositive.

POINT II

OXFORD/WFS NEVER BECAME A SUCCESSOR UNDER THE NLRA WITH A DUTY TO RECOGNIZE AND BARGAIN WITH LOCAL 399

(Compare Oxford/WFS Brief at 40-44 with GC Brief at 31-34 and CP Brief at 16-17)

Assuming that the NLRA applies here (which, Oxford/WFS strongly disputes), there seems to be no dispute that for a successorship obligation to arise, the prior bargaining unit must continue to be appropriate after the purported successor took over. However, that is where any agreement ends.

As we have previously demonstrated, while the predecessor's unit is considered presumptively appropriate, the presumption is not irrefutable and does not apply if circumstances dictate another unit. Thus, as previously cited, where "there is evidence that the parties have included two or more plants in a single collective-bargaining agreement, the bargaining history becomes controlling, and the *only* appropriate unit becomes the one consisting of all employees covered under the agreement." *Arrow Uniform Rental*, 300 NLRB 246, 248 (1990) (emphasis added). Accordingly, and as it should be, the Board is reluctant to disrupt multi-location bargaining units to the benefit of a small group or faction and the sacrifice of the far larger group of employees who have gained collective rights and labor stability through historic multi-location bargaining. (Oxford/WFS Brief at 41-43). And, here, as previously noted, that multi-location bargaining was not merely by agreement of the employer and a union, it was pursuant to the requirements of the RLA, which have applied – without challenge – to the AMRS/WFS-TWU relationship for the past 30 years.

GC and CP rely on the continuity at T5; assert (without discussion) that it would be inappropriate to place the T5 employees within a nationwide unit; and, argue that Oxford/WFS, in the words of the GC, "neglected to present the evidence necessary to carry their heavy burden to rebut the presumption that a single-facility unit is appropriate." (GC Brief at 34; *see also* CP Brief at 16-17). Rather, as noted in our initial brief, extensive evidence was presented supporting a nationwide unit, including but not limited to the 30 year nationwide bargaining history, centralized control of labor relations, and similarity of skills, functions and working conditions among both the employees at T5 and the employees at multiple other locations represented by TWU. (Oxford/WFS Brief at 43-44). Accordingly, if a heavy burden here should apply (which, as noted above, should not be standard), it plainly was met.

In sum, then, the ALJ erred in finding that the T5 unit, in the circumstances of this case, remained appropriate once Oxford/Worldwide – with its nationwide unit at multiple airports – began operations. Accordingly, even if NLRA jurisdiction applied here, which it does not, the ALJ erred in imposing a successorship obligation on Oxford/Worldwide.

POINT III

EVEN IF THE NLRA APPLIES AND OXFORD/WFS BECAME A SUCCESSOR, WHICH ARE NOT THE CASE, THE ALJ ERRED IN HOLDING THAT THEY WERE NOT PRIVILEGED TO SET INITIAL TERMS AND CONDITIONS OF EMPLOYMENT

(Compare Oxford/WFS Brief at 44-50 with GC Brief at 35-40 and CP Brief at 17-21)

As we have previously demonstrated, the Board has never imposed the draconian penalty of denial of the right to set initial terms and conditions in circumstances here at issue – where the "successor" applied another union contract, rather than required the employees to work non-union. GC argues that that "the right to establish initial terms and conditions of employment conferred by *Burns* is based on the premise that the successor employer will recognize the representative of the affected unit employees and enter into good-faith negotiations with their

union about terms and conditions of employment." (GC Brief at 35-36). However, that argument simply ignores the facts and teachings of *Burns*. There, and, as we have previously noted, is here the case, Burns was awarded a service contract performed previously by a company with the unionized workforce but, upon hiring the workforce, required the employees to become members of another union with which Burns had its own CBA. Critically, in *Burns*, the NLRB initially found that by applying its existing CBA, as a remedy, Burns would be required to apply the terms of its predecessor's CBA. Yet, the Supreme Court specifically reversed on this issue, holding that Burns' conduct in applying its own CBA did not bind Burns to "the substantive terms of the collective-bargaining contract the [incumbent] union had negotiated with [the predecessor] and to which Burns had in no way agreed." *NLRB v. Burns Int'l Security Services, Inc*., 406 U.S. 272, 281-282 (1972). (Oxford/WFS Brief at 47-49). And while CP apparently reluctantly "acknowledges that the facts in this case are similar to those in *Burns*," it erroneously states that *Burns* is distinguishable because "no issue was raised as to whether Burns lost the right to establish initial terms and conditions of employment…" (CP Brief at 20). However, as the recitation above makes clear, the Supreme Court reversed the NLRB *on this very issue*. The law could not be clearer. Try as they will, neither the ALJ, GC, nor CP can conjure any authority that rejects this holding in *Burns*.

As previously noted, Oxford/WFS never indicated a shred of non-union animus; accordingly, subsequent cases imposing "forfeiture" (GC Brief at 36; CP Brief at 20) of the right to set initial conditions where employment was conditioned on non-union status are simply inapposite, should have no bearing on the outcome of this case and, certainly, do not support the draconian relief which the ALJ has imposed. (Oxford/WFS Brief at 45-47).

Moreover, as we have previously detailed, imposition of this "forfeiture" is punitive, not

remedial, and, on that further basis, beyond the authority of the Board. (Oxford/WFS Brief at 49-50). GC asserts that the "forfeiture" is "not punitive … but rather is consistent with the equitable principle that any uncertainty created by a respondent's own misconduct should be resolved against it"; yet, elsewhere, it describes the action of Oxford/WFS as "based on their (mistaken) belief that they were subject to the Railway Labor Act." (*Compare* GC Brief at 36 *with* GC Brief at 37). This is not, and has never been a case of "misconduct." There has never been any question that Oxford/WFS believed *in good faith* that its new T5 operation was subject to the RLA, TWU's long-standing certifications issued by the NMB, and the nationwide WFS-TWU CBA. Oxford/WFS at all times was operating under the expectation (not, we submit a "mistaken" expectation) that, as had been the case for decades, WFS was subject to the exclusive jurisdiction of the RLA and acting in conformity with its NMB certifications and its *nationwide* TWU CBA. Oxford/WFS had a good-faith basis to apply the terms of its TWU contract, given the decades-long relationship and the nationwide unit *certified by the NMB* under the RLA. Imposing the relief of "forfeiture" here, and with it, millions of dollars of liability, can be viewed as nothing other than punitive.

CONCLUSION

For all of the reasons detailed herein, and those set forth in Oxford/WFS Brief, this case against Oxford/WFS should in all respects be dismissed.[3]

Dated: August 9, 2017

Respectfully submitted,

JACKSON LEWIS P.C.

By: /s
ROGER H. BRITON
KATHRYN J. BARRY

[3] We refer to and adopt Respondents' Total/Twin's brief as it relates to the issue of joint employment.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

OXFORD ELECTRONICS, INC. D/B/A OXFORD AIRPORT TECHNICAL SERVICES AND WORLDWIDE FLIGHT SERVICES, INC., JOINT EMPLOYERS;

OXFORD ELECTRONICS, INC. D/B/A OXFORD AIRPORT TECHNICAL SERVICES AND TOTAL FACILITY MAINTENANCE, INC., JOINT EMPLOYERS;

OXFORD ELECTRONICS, INC. D/B/A OXFORD AIRPORT TECHNICAL SERVICES AND TWIN STAFFING, INC., JOINT EMPLOEYRS;

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INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 399, AFL-CIO

TRANSPORTATION WORKERS UNION OF AMERICA-LOCAL 504, AFL-CIO (OXFORD ELECTRONICS, INC. D/B/A OXFORD AIRPORT TECJHNICAL SERVICES, WORLWIDE FLIGHT SERVICES, INC., TOTAL FACILITY MAINTENANCE, INC., AND TWIN TAFFING INC.).

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and

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INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 399, AFL-CIO

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of August, 2017, I served a true copy of **REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE ON BEHALF OF RESPONDENTS OXFORD**

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